Supreme Court, U.S.
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No. ____

In The

Supreme Court of the United States

October Term, 1993

JAMES M. EVANS,

Petitioner,

v.

DEPARTMENT OF MOTOR VEHICLES, of the State of California and FRANK S. ZOLIN, individually and in his capacity as Director of Motor Vehicles,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeal, Third Appellate District, State Of California

PETITION FOR A WRIT OF CERTIORARI

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76 pp

QUESTIONS PRESENTED

1. Whether a state may, consistent with due process, revoke a person's license to do business after a default hearing, when notice of the disciplinary hearing, sent by certified mail, is misdelivered to the wrong person, and the licensee never learns of the disciplinary proceeding until after the revocation decision is issued.

2. Whether the state may, consistent with due process, refuse to set aside a license revocation decision and only permit the licensee to submit mitigating evidence on reconsideration, when the revocation decision is issued after a default hearing with no actual or effective notice to the licensee.

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PETITION FOR WRIT OF CERTIORARI

Petitioner James M. Evans respectfully petitions for a writ of certiorari to review a decision of the Court of Appeal, Third Appellate District, State of California.

OPINIONS BELOW

The Superior Court, State of California, Sacramento County, entered a judgment on May, 24, 1991. A copy is appended as Appendix A, App. 1-3. The Court of Appeal, Third Appellate District, State of California, issued a decision on January 12, 1994, published as *Evans v. Department of Motor Vehicles*, 21 Cal.App.4th 958, 26 Cal.Rptr.2d 460 (1994). A copy is appended as Appendix B, App. 4-33. Rehearing was denied on February 10, 1994, and a copy of that order is appended as Appendix C, App. 34. The Supreme Court of the State of California denied review on March 31, 1994, and a copy of that order is appended as Appendix D, App. 35.

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a).

This petition is filed within 90 days of March 31, 1994, the date the Supreme Court of the State of California denied review of the decision of the Court of Appeal, Third Appellate District, State of California, entered on January 12, 1994.

CONSTITUTIONAL, STATUTORY AND OTHER AUTHORITY

Constitution of the United States

The Due Process Clause of the Fourteenth Amendment provides: " . . . nor shall any State deprive any

person of life, liberty, or property, without due process of law. . . . " U.S. Const., amend. XIV, § 1.

Federal Law and Authority

The Civil Rights Act of 1871, as amended, provides, in pertinent part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the person injured in an action at law, suit in equity, or other proper proceedings for redress." 42 U.S.C. § 1983.

The Domestic Mail Manual (DMM) of the United States Postal Service provides, in pertinent part: "Certified mail not restricted in delivery is delivered to the addressee or addressee's authorized representative." DMM § 912 3.1.

State Law

The California Vehicle Code, which governs state licensing of automobile dismantlers, provides, in pertinent part:

> "The department, after notice and hearing, may suspend or revoke the license issued to an automobile dismantler upon the determination that the person to whom the license was issued is not lawfully entitled thereto or has done any of the following:. . . . " Cal. Veh. Code § 11509(a) (West Supp. 1994).
>
> "[E]very hearing provided for in this chapter shall be held pursuant to Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code." Cal. Veh. Code § 11509(c) (West Supp. 1994).

California's Administrative Procedure Act, California Government Code §§ 11500, *et seq.*, provides, in pertinent

part: "no order adversely affecting the rights of the respondent shall be made by the agency in any case unless the respondent shall have been served personally or by registered mail as provided herein, or shall have filed a notice of defense or otherwise appeared." Cal. Gov't Code § 11505(c) (West 1992).

"Whenever any notice or other communication is required by any law to be mailed by registered mail to or by the state, or any officer or agency thereof, the mailing of such notice or other communication by certified mail shall be deemed to be a sufficient compliance with the requirements of such law." Cal. Gov't Code § 8311 (West 1992).

STATEMENT OF THE CASE

INTRODUCTION

This case raises a due process issue of nation-wide importance: the constitutionality of service of process by mail when the Postal Service makes a mistake and misdelivers the mail, and neither the addressee nor his or her agent ever receives either the mailed notice or any actual notice. Although service by mail is becoming standard operating procedure, this Court has never addressed the problem of mail delivery gone astray.

Petitioner asserts that due process is denied if personal jurisdiction is based solely on service by mail and, due to no fault of the addressee, the mail is never delivered to the addressee, but is, instead, erroneously given to someone with no authority to receive the addressee's mail. Constitutional guarantees require the government to make certain determinations only after both notice and opportunity to be heard; those same guarantees preclude default decisions if the government's delivery agent misdelivers notice, and no actual notice is ever received.

Jurisdiction is based on service by mail in a multitude of judicial and administrative settings. The state

statutes at issue here, provisions of California's Administrative Procedure Act and the California Vehicle Code, are typical of various federal and state laws and rules permitting service of process by mail either with acknowledgment of receipt, or by certified or registered mail. Rule 4 of the Federal Rules of Civil Procedure authorizes service of summons and complaint by mail, and many federal agencies also permit mail service of initial pleadings in administrative proceedings. Rule 4 also provides that service in federal courts may be according to state law methods, and most states, like California, allow their courts and their administrative agencies to obtain personal jurisdiction by service by mail.

The United States Postal Service is generally dependable; the mail is properly delivered, and the notice reaches the person to whom it is addressed. But sometimes, the mail carrier makes a mistake, and the mail never reaches the intended addressee. The question then becomes: Who bears the burden of the results of nondelivery, the party electing to rely upon a presumption that mail will be properly delivered, or the party to whom the mail is addressed?

That is exactly the issue here. The California Department of Motor Vehicles (DMV) sent petitioner James M. Evans notice of a business license revocation hearing by certified mail. Due to a delivery error by the Postal Service, in no way attributable to Mr. Evans, the notice went awry. DMV received a return receipt clearly not signed either by Mr. Evans or his authorized representative. Nevertheless, DMV held a default hearing and took away Mr. Evans' license to operate his automobile dismantler business. Mr. Evans never received any prior notice.

The first communication Mr. Evans received was DMV's license revocation decision. He immediately notified DMV that he did not have any prior notice, but the state refused to reconsider its decision or to provide him with any opportunity to be heard on the merits. Instead of beginning anew, the state reopened the hearing only to

allow Mr. Evans to present mitigating evidence bearing on the penalty. The state expressly refused to allow him any opportunity to refute the charges.

Petitioner submits that mail clearly proven to be misdelivered by the Postal Service is constitutionally ineffective to confer personal jurisdiction. Further, if a decision is rendered without adequate notice, the only sufficient remedy is to erase that decision and begin anew.

Since the possibility of misdelivered mail is a risk inherent under all statutes and rules permitting service of process by mail, a decision by this Court is essential to ensure that all procedures authorizing service by mail, including those of California's, satisfy due process.

FACTUAL BACKGROUND

Petitioner James M. Evans held an automobile dismantler's license issued by California's Department of Motor Vehicles. DMV convened an administrative hearing to determine whether Mr. Evans' license should be revoked. It sent an administrative complaint, called an "accusation," and notice of the hearing by means of certified mail addressed to Mr. Evans. CT 2, Petition, ¶ 6; CT 62, Answer, ¶ 1.[1]

The fact that DMV deposited the notice with the Postal Service with a request for delivery by certified mail satisfies the relevant state statutes, California Government Code §§ 8311 and 11505(c), and California Vehicle Code §§ 11509(a) and (c). *Evans*, 21 Cal.App.4th at 966-70, 26 Cal.Rptr.2d at 466-68; App. 10-16. "[T]he statutory scheme requires only notice by registered or certified mail to the licensee's established place of business," not receipt. *Evans*, 21 Cal.App.4th at 972, 26 Cal.Rptr.2d at 469; App. 19.

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[1] CT refers to the Clerk's Transcript in 3 Civil C011373, the proceeding before the Court of Appeal, Third Appellate District, State of California.

Mr. Evans never received any notice that DMV was contemplating revoking his license. CT 3, Petition, ¶ 8. DMV acknowledged "[t]he accusation and notice of hearing were never delivered to Mr. EVANS or to anyone authorized to act on his behalf." CT 62, Answer, ¶ 1.

DMV received a return receipt signed by a Linda Courtain, who signed as addressee, not as Mr. Evans' agent or authorized representative. CT 3, Petition, ¶ 8; CT 62, Answer, ¶ 1. Ms. Courtain was staying with her brother, one of Mr. Evans' employees, who lived in a small cottage on the property where Mr. Evans operated his business. CT 22-23, Declaration of James M. Evans, ¶¶ 6 and 8.

Mr. Evans never received the certified mail DMV had sent, never authorized Ms. Courtain to act as his agent or to receive mail on his behalf, and never received any notice of the hearing from DMV, Ms. Courtain or anyone else. CT 22-23, Evans Declaration, ¶¶ 3-5 and 9-10.

After receiving the return receipt signed by Ms. Courtain as addressee, DMV held its hearing and issued a default decision revoking Mr. Evans' license. CT 139-42. Mr. Evans had filed no response and did not appear at the hearing.

Mr. Evans first learned of DMV's actions when he received the decision revoking his license to operate his automobile dismantler's business. CT 22, Evans Declaration, ¶ 3. He immediately requested reconsideration, based on lack of notice. CT 37. DMV provided a limited rehearing "for the sole purpose of allowing [him] to offer evidence in extenuation and mitigation. . . . " CT 150.

Mr. Evans' attorney asked "to have a de novo hearing on all matters." Admin. RT 11:15-16.[2] But DMV would not

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[2] "Admin. RT" refers to the reporter's transcript of the second administrative hearing, which Mr. Evans did attend on February 16, 1990. The administrative record, including the reporter's transcript for the second administrative hearing, was

permit Mr. Evans "to attack the findings which have been entered as to whether or not these violations occurred." *Id.* at 13:12-17. The Administrative Law Judge for the second hearing ruled "the remand is a limited remand. It not [sic] a hearing de novo; it is not a hearing to attack the findings, but simply to offer evidence in extenuation and mitigation." *Id.* at 14:22-25. *See also* CT 4, Petition, ¶ 15; CT 24, Evans Declaration, ¶¶ 14, 15.

After the limited rehearing, DMV decided that Mr. Evans had not shown sufficient mitigation or extenuation to cause DMV to modify its original decision to revoke his license. CT 4, Petition, ¶ 16; CT 62, Answer, ¶ 1. Mr. Evans never had any opportunity to address the merits of the charges against him, which DMV had, by default, determined warranted license revocation, destroying Mr. Evans' business.

PROCEEDINGS BELOW

Mr. Evans sought judicial review of DMV's decision, challenging the decision under 42 U.S.C. § 1983, as a violation of due process, as well as under state law. CT 1-7.

The Superior Court, State of California, Sacramento County, entered a judgment commanding DMV to set aside its decision and to reinstate Mr. Evans' license unless and until, at a hearing held after proper notice, DMV proved all charges supporting revocation and Mr. Evans had the opportunity to rebut all the evidence. CT 191-92; App. 2-3. The Superior Court determined that the Department and its Director "denied Mr. Evans due process, acted in excess of their jurisdiction, failed to afford Mr. Evans a fair trial, failed to proceed in the manner required by law, and abused their discretion in refusing to consider Mr. Evans' objection . . . that he had not been

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filed with the trial court. CT 50-51. The entire administrative record is included in the record on appeal. CT 205-07.

served the accusation and notice of hearing . . . and in granting Mr. Evans a limited rehearing. . . . " CT 191; App. 2.

DMV appealed. CT 201-03. The Court of Appeal, Third Appellate District, State of California, in a 2-1 decision, reversed the Superior Court's judgment, finding, *inter alia*, that no due process violation occurred. As the appellate court stated, "our review of California's statutory method for serving notice of an accusation and hearing seeking to revoke an automobile dismantler's license leads us to conclude that the method is reasonably calculated to give the licensee notice of the accusation and hearing and, thus, satisfies due process of law." *Evans*, 21 Cal.App.4th at 967-68, 26 Cal.Rptr.2d at 466; App. 12. According to the appellate court, depositing the accusation and notice of hearing with the Postal Service, asking that they be sent by certified mail, was all that due process required. *Id.*

The Court of Appeal denied Mr. Evans' petition for rehearing. App. C. Thereafter, the Supreme Court of the State of California denied a petition to review the Court of Appeal's decision. App. D.

REASONS FOR GRANTING THE PETITION

Review by this Court is essential to determine the constitutionality of acquiring personal jurisdiction by service by mail, when, due to no fault of the addressee, that mail never reaches the person to whom it is addressed.

Petitioner submits that service by mail effective to confer personal jurisdiction requires actual delivery either to the addressee or to his or her agent. Lack of delivery for reasons not attributable to the addressee is not constitutionally sufficient, at least where there is no actual notice to the person to be served.

California statutes governing the procedure by which administrative agencies may obtain jurisdiction by service by mail fail to ensure that procedural due process

requirements are satisfied. As construed by the California courts, decisions which destroy a person's business may be issued so long as notice by certified mail is merely deposited with the Postal Service, even though that mail never reaches the addressee or the addressee's agent, and is, instead, misdelivered to someone not authorized to receive the addressee's mail. According to the California Court of Appeal, despite the Postal Service's failure to follow its own procedures for delivery of certified mail, no statutory violation occurred.

Due process was denied, however. The Postal Service's defective delivery of the mail, combined with the lack of any actual notice to Mr. Evans, deprived DMV of any authority to revoke Mr. Evans' license to do business.

Since service of process by mail is now commonplace among federal and state courts and agencies throughout the country, the constitutionality of mail service gone wrong is a matter of national concern.

I

THE QUESTIONS PRESENTED ARE CRITICAL IN ALL FEDERAL COURTS AS WELL AS IN STATES PERMITTING SERVICE BY MAIL

Service of process by mail is authorized in all federal courts and all but one state court, and in many federal and state administrative proceedings. Yet this Court has, to date, never delineated the constitutional requirements for service by mail effective to confer personal jurisdiction. In particular, this Court has not decided the sufficiency of such service when the mail is misdelivered and the addressee receives no actual notice. A decision as to the constitutional requirements for effective service of process by mail will have a far-reaching effect.

The Federal Rules of Civil Procedure have permitted a signed acknowledgment or waiver to substitute for personal service since 1983, when former Rule 4(c)(2)(C)(ii) became effective. In adopting service by mail, "Congress carefully structured the Rule to insure

that default judgments would not be entered without proof of actual notice." *Worrell v. B. F. Goodrich Co.*, 845 F.2d 840, 841 (9th Cir. 1988), *cert. denied*, 491 U.S. 907 (1989). *See also Coldwell Banker & Co. v. Eyde*, 661 F.Supp. 657, 658-59 (N.D. Ill. 1986) (examining legislative history).

The legislative history of the 1983 amendment to Rule 4, reprinted in 96 F.R.D. 81 (1983), includes a commentary by David D. Siegel. As he explains, "Sub-subparagraph (ii) is entirely new: it is the provision – a key part of the amendment – that introduces service by mail as a basic federal method." Siegel, *Practice Commentary of Amendment of Federal Rule 4 (Eff. Feb. 26, 1983) with Special Statute of Limitations Precautions*, 96 F.R.D. 81, 95 (1983).

> The original mail proposals were in part responsible for Congress's rejection of the Advisory Committee recommendation. As the Committee draft (the Supreme Court promulgation) had it, registered or certified mail with return receipt requested were the methods allowed. They were rejected; in sub-subparagraph (ii) Congress now settles on ordinary first class mail, but with a special "acknowledgment" procedure modeled on a system found to work in California. . . . The person served must execute a copy of the acknowledgment, upon either oath or affirmation, and return it to the sender. . . . If the sender doesn't get it back within [the specified] time, the mailing is ineffective. . . .

Id. This legislative history confirms that actual delivery is essential before service by mail is effective.

Service by state law methods is also permitted under the Federal Rules of Civil Procedure. Service may be made pursuant to the law of either the state in which the action is filed or the state where service is effected. Fed. R. Civ. P. 4(e) (formerly Fed. R. Civ. P. 4(c)(2)(C)(i)). Mail

service is also permitted under the rules governing many federal administrative agencies.[3]

The vast majority of states permit service by mail to confer personal jurisdiction in judicial proceedings. Including California, forty-nine states and the District of Columbia permit service of process by mail. Twenty-four states permit service by mail, but require that when service of process on an individual is accomplished by mail, the mail must either be sent by certified or registered mail, return receipt requested, with restricted delivery to the addressee only or to his or her authorized agent, or a signed acknowledgment or waiver must be returned.[4] Six

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[3] The federal Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*, comparable to California's Administrative Procedure Act, requires federal agencies to provide timely notice. 5 U.S.C. § 554(b). The National Labor Relations Board, the Federal Aviation Administration, and the Environmental Protection Agency are three typical examples of federal agencies permitting service by mail. *See* 29 U.S.C. § 160(b) (N.L.R.B. follows Federal Rules of Civil Procedure); 47 U.S.C. § 1485(c) (FAA may serve notices by certified or registered mail addressed to person or person's agent); 40 C.F.R. § 22.04(b) (EPA may serve complaints by certified mail, return receipt requested).

[4] California permits service by mail with a return acknowledgment form similar to that in the Federal Rules of Civil Procedure. Cal. Code Civ. Proc. § 415.30 (West 1973). Service on persons outside the state may be by mail "requiring a return receipt." Cal. Code Civ. Proc. § 415.40 (West Supp. 1994). For other states with statutes permitting service of process by mail, either with restricted delivery requiring a signed receipt or with a signed acknowledgment, *see* Ala. R. Civ. P. 4.1(c)(1)-(3); Alaska Civ. R. 4(h); Ariz. R. Civ. P. 4.1(c); Ark. R. Civ. P. 4(d)(8)(A), 4(e)(3); Haw. Rev. Stat. § 1-28 (1985); Ky. R. Civ. P. 4.01(a); Me. R. Civ. P. 4(c)(1), 4(f); Md. R. Civ. P. 3-121(a), 3-124(a), 3-126(a); Mich. Ct. R. 2.105(A)(2); Miss. R. Civ. P. 4(c)(3), 4(c)(5); Mo. R. Civ. P. 54.16; N.M. R. Civ. P. 1-004(E); N.Y. Civ. Prac. L. & R. § 312-a (McKinney Supp. 1993); N.C. R. Civ. P. 4(j)(1), 4(j)(2); N.D. Ct. R. 4(d)(2)(A); Okla. Stat. Ann., tit. 12, § 2004(b) (West 1992); Pa. R. Civ. P. 403; S.C. R. Civ. P. 4(d)(8); Tenn. Ct. R.

states provide for service by signed acknowledgment or by registered or certified mail, return receipt requested, only on nonresident defendants or their authorized agents.[5] Nineteen other states and the District of Columbia also permit service by mail, subject to various restrictions.[6] Petitioner will not even attempt to list the states

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4.04(12); Vt. R. Civ. P. 4(1); W. Va. R. Civ. P. 4(d)(1); Wyo. R. Civ. P. 4(l)(2).

Minnesota law does not specifically provide for service by mail. However, the Minnesota Supreme Court has held that service by certified mail that actually reaches the party to be served is equivalent to personal service. *Stonewall Ins. Co. v. Horak*, 325 N.W.2d 134 (Minn. 1982). "[P]rudence . . . dictate[s] that restricted certified mail, which includes an endorsement on the envelope to 'deliver to addressee only,' be used." *Id.* at 136.

[5] *See* Del. Code tit. 10, § 3104(d)-(g) (Michie 1992); Fla. Stat. § 48.161 (West 1993) (Florida also allows service by registered or certified mail, with return receipt, on person who conceals his or her whereabouts); La. Rev. Stat. Ann. § 13:3204 (West Supp. 1994); Mass. R. Civ. P. 4(e)(3), 4(f); N.H. Rev. Stat. Ann. § 510:4.II (Supp. 1993) (New Hampshire also provides for service by certified mail in small claims actions, N.H. Rev. Stat. Ann. § 503:6 (Supp. 1993)); R.I. Super. Ct. R. Civ. P. 4(e)(1), 4(e)(2).

[6] *See* Colo. R. Civ. P. 4(g)(1) (service of process by registered or certified mail only by leave of court in property cases or other proceedings in rem in which defendant resides outside of Colorado; return receipt must be signed by the addressee only); Conn. Gen. Stat. Ann. §§ 4-150, 52-59b(c) (West 1988, 1991 and Supp. 1994) (service by certified mail, return receipt requested, on nonresidents and in any case involving claims against the state); D.C. R. Super. Ct. Civ. P. 4(c)(2)(C); Ga. Code Ann. § 81A-104 (Harrison Supp. 1993) (service by registered mail on corporations and, for sums less than $200.00, by posting and certified or registered mail); Idaho R. Civ. P. 4(g)(4) (when service is by registered or certified mail, proof of service must be made by affidavit of person over 18 who mailed the process, and must include postal receipts indicating whether defendant received service of process by mail); Ill. S. Ct. R. 284(b) (service by registered or certified mail, return receipt requested,

which have statutes like the federal Administrative Procedure Act and California's Administrative Procedure Act, allowing administrative agencies to use mail service.

Only one state appears never to permit any service of process by mail.[7]

In those jurisdictions permitting service by mail in judicial proceedings, decisions in fourteen states and in the

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restricted delivery, in small claims actions); Ind. R. of Trial P. 4.1(A)(1); Iowa Code Ann. §§ 321.501, 618.15 (West 1985 and Supp. 1994) (service by restricted certified mail, delivered to addressee only, in cases involving nonresident owners or operators of motor vehicles); Kan. Stat. Ann. §§ 60.303(b), 60.304(a) (Supp. 1993); Mont. R. Civ. P. 4D(2)(f) and 4D(6)(a) (service by registered or certified mail on corporations, marked "Delivery to Addressee Only" and "Return Receipt Requested."); Neb. Rev. Stat. § 25-505.01 (1989) (service by certified mail must be sent with return receipt requested and proof of service must be filed with signed receipt attached); Nev. Rev. Stat. § 14.070 (1993) (service by registered or certified mail, return receipt requested, on operator of motor vehicle involved in accident; defendant must sign return receipt); N.J. Civ. Prac. R. 4:4-4(a)(2) (service by "registered, certified or ordinary mail, which shall be effective only if the party served answers or otherwise appears in response thereto."); Ohio Civ. R. 4.1(1), 4.3(B)(1) (service by certified mail, return receipt requested; any person may sign return receipt); Or. R. Civ. P. 7D.(2)(d); S.D. Codified Laws Ann. § 15-6-4(d)(8) (Supp. 1993) (mail service on state, with executed admission of service); Tex. R. Civ. P. 106(a)(2), 107 (service by registered or certified mail, return receipt requested, and return receipt must be signed by addressee); Utah R. Civ. P. 4(f)-(h) (service by registered or certified mail, return receipt requested, only on defendant residing in foreign country, defendant who is unknown, where service on all parties is impracticable, or where defendant is evading service of process; receipt signed by addressee or other evidence of delivery to addressee required); Va. Code Ann. § 8.01-296 (Michie 1992) (mail service as supplement to posting); Wis. Stat. Ann. § 801.11(5)(d) (West 1977 and Supp. 1993) (service by registered mail on insurer).

[7] *See* Wash. Rev. Code Ann. § 4.28.080 (West Supp. 1994).

District of Columbia hold that service of process by registered or certified mail is inadequate when the defendant is not personally served and a person other than the defendant signs the return receipt.[8] Lack of any signed return receipt has also been held to be ineffective service.[9] It appears that only five states other than California have held that the signature of the addressee or his or her agent is not essential, and four of these decisions involved cases in which the defendant received actual notice.[10] The other decision involved a small claims matter.[11]

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[8] *See Ex Parte Shuttleworth*, 410 So.2d 896, 900 (Ala. 1982) (signature of father insufficient); *Cole v. First Nat'l Bank*, 800 S.W.2d 412, 414 (Ark. 1990) (signature of stepdaughter inadequate); *Ingrassia v. Ingrassia*, 509 N.E.2d 729, 742 (Ill. Ct. App. 1987); *Roberts v. Watson*, 359 N.E.2d 615, 620 (Ind. Ct. App. 1977) (signature of husband insufficient); *Esterdahl v. Wilson*, 110 N.W.2d 241, 243-44 (Iowa 1961) (signature of wife insufficient); *Administrators of Tulane Educational Fund v. Ortego*, 475 So.2d 764, 764 (La. 1985); *Guen v. Guen*, 381 A.2d 721, 724-25 (Md. Ct. App. 1978); *Bucholz v. Hutton*, 153 F.Supp. 62, 68 (D. Mont. 1957); *Hudson v. Musor*, 519 A.2d 319, 321 (N.H. 1986); *Oak Island Southwind Realty v. Pruitt*, 366 S.E.2d 489, 491-92 (N.C. Ct. App. 1988); *Southgate Shopping Center Corp. v. Jones*, 361 N.E.2d 460, 463 (Ohio Ct. App. 1975); *Lampe v. Xouth, Inc.*, 952 F.2d 697, 701 (3d Cir. 1991) (Pennsylvania); *Rocky Mtn. Adjustment Co. v. Pease Bros.*, 604 P.2d 921, 923 (Utah 1979); *Oedekoven v. Oedekoven*, 475 P.2d 307, 308 (Wyo. 1970); *Larry M. Rosen & Associates, Inc. v. Hurwitz*, 465 A.2d 1114, 1117 (D.C. Ct. App. 1983); *Masri v. Adamar of New Jersey, Inc.*, 595 A.2d 398, 399, 401-02 (D.C. Ct. App. 1991).

[9] *See Lydick v. Smith*, 266 N.W.2d 208, 211 (Neb. 1978); *Edwards v. Edwards*, 801 P.2d 782, 786 (Or. 1990).

[10] *See Cox v. Rueff Lighting Co.*, 589 S.W.2d 606, 607 (Ky. Ct. App. 1979) (registered mail received by defendant's business associate, who then told defendant, was sufficient); *Hill v. Frawley*, 400 N.W.2d 328, 329 (Mich. Ct. App. 1986) (actual notice received); *Akron-Canton Regional Airport Auth. v. Swinehart*, 406 N.E.2d 811, 814-15 (Ohio 1980) (appearance made); *Jacobson v. Sternberg*, 408 S.E.2d 245, 246-47 (S.C. 1991) (actual notice received).

[11] *See Dobrowolski v. LaPorte*, 348 N.E.2d 237, 239 (Ill. Ct. App. 1976) (small claims case).

This rather exhaustive review of the rules for service of process by mail in federal and state courts, as well as various administrative proceedings, makes it clear that both federal and state courts and agencies are facing the same issues presented here. Service by mail is vastly simpler, and less expensive, than personal service. It is highly likely that service by mail will be increasingly used throughout the jurisdictions in this country.

Due process requirements for service of process by mail must be spelled out so that in all judicial and administrative proceedings in which personal jurisdiction is based on service by mail, the constitutional standards for notice and opportunity to be heard are satisfied.

II

DUE PROCESS PRECLUDES BASING JURISDICTION ON MISDELIVERED CERTIFIED MAIL, WHERE SERVICE IS NOT AVOIDED AND NO ACTUAL NOTICE IS RECEIVED

A. The fundamental requirements of procedural due process are notice and opportunity to be heard.

"Failure to give notice violates 'the most rudimentary demands of due process of law.'" *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 84, 99 L.Ed.2d 75, 81 (1988) (citations omitted). The due process requirements of notice and opportunity for hearing applicable to judicial proceedings also attach to determinations by administrative agencies which exercise judicial functions. *Goldsmith v. United States Board of Tax Appeals*, 270 U.S. 117, 123, 70 L.Ed. 494, 497 (1926).

A person must be effectively served before a tribunal acquires jurisdiction to deprive that person of property. *Hansberry v. Lee*, 311 U.S. 32, 40, 85 L.Ed. 22, 26 (1940). While a presumption of effective service exists when statutory service procedures are followed, that presumption is not conclusive. In *Peralta*, for example, a return was filed showing personal service, but the defendant

denied he had ever been personally served. This Court held the default judgment against him could not stand if he was not, in fact, served. "[A] judgment entered without notice or service is constitutionally infirm." *Id.*, 485 U.S. at 84, 99 L.Ed.2d at 81.

DMV's default decision here, revoking Mr. Evans' license to operate his business, is equally invalid. The mail carrier in this case, like the process server in *Peralta*, simply failed to carry out the duties entrusted to the carrier to effectuate delivery. While California's statutes may have been satisfied, due process was not.

Mr. Evans does not assert that service of process by mail is, *per se*, unconstitutional since due process only requires service reasonably calculated to provide notice, not actual notice. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 319, 94 L.Ed. 865, 876 (1950). Nevertheless, service by mail does not provide procedural due process if the Postal Service misdelivers the mail to the wrong person, and actual notice is never received. This is particularly true where, as here, the return receipt the government receives shows that mail delivery was ineffective and did not reach the addressee.

In *Robinson v. Hanrahan*, 409 U.S. 38, 34 L.Ed.2d 47 (1972), the last occasion in which this Court addressed the sufficiency of service by mail, a forfeiture notice was mailed to a person's home address, as state law permitted, but the notice was not timely received because the owner was in jail. Although this mailing satisfied state law, this Court held that due process was violated. *Id.*, 409 U.S. at 40, 34 L.Ed.2d at 49. The notice mailed to the home address was not sufficient because the state knew he was in jail. *Id.*

This case presents an even more egregious violation of the fundamental requirements of notice and opportunity to be heard. When DMV held the default hearing and revoked Mr. Evans' license, it knew, by the erroneous addressee's signature on the return receipt, that the service agent it had selected, the Postal Service, had not faithfully accomplished its appointed task.

B. Personal jurisdiction is not conferred based on service by mail when mail is delivered neither to the addressee nor to his or her representative, due to no fault of the addressee.

Alternatives to personal service are constitutionally permissible. But as Justice Holmes warned in discussing one of these alternatives, service by publication, "great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact." *McDonald v. Mabee*, 243 U.S. 90, 91, 61 L.Ed. 608, 609 (1917). In *Mullane*, this Court approved alternatives to personal service, saying, " 'Now and then an extraordinary case may turn up, but . . . in the great majority of instances no doubt justice will be done.' " *Id.*, 339 U.S. at 319, 94 L.Ed. at 876.[12]

This is one of those extraordinary cases. For unknown reasons, certified mail addressed to Mr. Evans was, in fact, delivered neither to him nor to any agent authorized to receive his mail. Instead, the mail carrier somehow permitted a woman named Linda Courtain to sign as addressee, although she was clearly not Mr. Evans and, as his testimony proved, was never authorized to accept mail for him. DMV conceded she was not an authorized representative.

Few cases have directly addressed the constitutional inadequacy of service by registered or certified mail where the procedures for such mail were not followed, the mail was not delivered, and no actual notice was received. In 1927, this Court did review the sufficiency of

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[12] The precise issue in *Mullane* was whether notice to a large class whose whereabouts were unknown could be given by publication, with a special guardian appointed to represent those not appearing. This Court held due process was satisfied because the guardian as well as those who actually received notice shared identical interests with the entire class, and adequately safeguarded the interests of all.

service of process by registered mail on a Pennsylvania resident involved in a motor vehicle accident in Massachusetts, and held that service by registered mail did not contravene due process. *Hess v. Pawloski*, 274 U.S. 352, 71 L.Ed. 1091 (1927). There, the Massachusetts statute providing for service by registered mail satisfied due process because it required that a nonresident "shall actually receive and receipt for notice of the service and a copy of the process." *Id.*, 274 U.S. at 356, 71 L.Ed. at 1094.

This Court has found due process violated by a statute not making it reasonably probable that notice would be given to a defendant. *Wuchter v. Pizzutti*, 276 U.S. 13, 18-19, 72 L.Ed. 446, 449 (1928). There, this Court struck down a state statute permitting service on a nonresident by delivery to the Secretary of State. *Hess* was distinguished as requiring "actual personal service to be evidenced by the written admission of the defendant." *Wuchter*, 276 U.S. at 19, 72 L.Ed. at 449.

Wise v. Herzog, 114 F.2d 486 (D.C. Cir. 1940), appears to be the only Court of Appeals decision directly linking a requirement of actual receipt with constitutionally sufficient service of process by mail. There, the court held that due process is not satisfied by a statute and court rule permitting service by registered mail if no signed receipt is returned. A default judgment had been entered after service by registered mail even though no signed receipt was returned. The defendant moved to vacate the default judgment and quash service. The trial court denied the motion, but the Court of Appeals for the District of Columbia reversed, saying:

> Service of process by registered mail, as provided in the pertinent statute, has been recognized as sufficient to satisfy the requirements of due process of law. However, in view of appellant's denial that she received notice in any form, the question arises whether, in the present case, such service was actually accomplished, in conformance with the statute. In answering the question we must so construe the language of

> the statute – and of the rule of court, promulgated pursuant thereto – as to avoid any doubt of constitutionality. The presumption, of course, must be that Congress intended service by registered mail to be so made as to insure due process of law.
>
> In our view the requirements of due process can be satisfied by compliance with the provisions of the statute as construed in Rule 9. . . . [T]he record fails to show (1) that the registered letter was delivered by the postman to the addressee, or to any other responsible person qualified to receive the addressee's registered mail; or (2) that the notice in fact came to the attention of the addressee within a reasonable time after delivery and before the return day; or (3) that the notice was refused by the defendant and not delivered for that reason; or (4) that a return receipt shows delivery to the defendant, or to a representative or agent of the defendant, and the date of such delivery or refusal by the defendant. In other words, the record fails to show exactly the things which it should show, in order to comply with the statute, with the rule, and with the requirements of due process. It follows that the attempted service was insufficient; the judgment should be vacated; and the motion to quash service should be granted.

Id. at 489-91 (footnotes and italics omitted).[13]

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[13] Here, there is absolutely no evidence that Mr. Evans evaded service, so this case does not raise the third factor considered in *Wise*, where notice by certified mail is refused by the addressee and not delivered for that reason.

Rule 9, to which the Court of Appeals referred, provided, in pertinent part, that the required notice must be

> delivered by the postman *to the addressee or to any other responsible person qualified to receive the addressee's registered mail*, in accordance with the Postal Laws and Regulations of the United States, which Laws and

The Federal Rules of Civil Procedure, under which mail service of process according to state law has long been permitted, also now expressly permit service of summons and complaint by mail. Effective 1983, former Fed. R. Civ. P. 4(c)(2)(C)(ii) provided for service "by mailing a copy of the summons and complaint (by first-class mail, postage pre-paid) to the person to be served, together with two copies of a notice and acknowledgment. . . . " Pub.L. 97-462, § 2, 96 Stat. 2527. Effective December 1, 1993, Fed. R. Civ. P. 4(d), substantially derived from former Fed. R. Civ. P. 4(c)(2)(C)(ii), similarly provides that a defendant may waive service and avoid costs of service by returning a waiver of service to the plaintiff after the plaintiff mails the summons and complaint to the defendant or the defendant's agent, along with a request for waiver. The waiver must be "addressed directly to the defendant, if an individual, or else to an officer or managing or general agent (or other agent authorized by appointment or law to receive service of process) of a defendant. . . . " Fed. R. Civ. P. 4(d)(2)(A). The waiver must be signed by the defendant or an authorized agent. Fed. R. Civ. P. 84 and Form 1B.

Circuit courts reviewing personal jurisdiction acquired by service by mail under former Fed. R. Civ. P. 4(c)(2)(C)(ii), now Fed. R. Civ. P. 4(d), have generally agreed with *Wise*. They have imposed the same strict requirement of a return receipt, acknowledgment or waiver signed by the defendant or an authorized agent, avoiding the need to address the due process problems that would arise if a signed return were not required.

> Regulations shall be judicially noticed in this Branch. Service shall not be set aside on the ground that the notice was delivered to a person not so qualified, *if the notice in fact came to the attention of the addressee* within a reasonable time after delivery by the postman, and within a reasonable time before the return day named in said notice.

Id., 114 F.2d at 490 n.16 (italics in original).

A typical decision reviewing the requirements of former Rule 4(c)(2)(C)(ii), now embodied in Rule 4(d), is that of the Ninth Circuit in *Mason v. Genisco Technology Corp.*, 960 F.2d 849 (9th Cir. 1992). There, the court held that the acknowledgment of service must be signed and returned by the addressee. A default judgment had been entered after a summons and complaint had been mailed by first-class mail, return receipt requested, and the defendant's wife had signed the return receipt. The defendant sought relief from default, based on lack of personal jurisdiction, but the district court denied the motion.

The Ninth Circuit reversed, concluding there was no effective service under former Rule 4(c)(2)(C)(ii) because "service pursuant to federal law is ineffective unless the defendant timely returns the acknowledgment form." *Id.* at 852.[14] *See also Worrell*, 845 F.2d at 841 ("The rule plainly states that service fails unless the defendant returns the signed acknowledgment form.").

Most other circuits have agreed that an acknowledgment signed by the defendant or the defendant's authorized agent is required. *See Carimi v. Royal Caribbean Cruise Line, Inc.*, 959 F.2d 1344, 1346 (5th Cir. 1992); *Media Duplication Servs., Ltd. v. HDG Software, Inc.*, 928 F.2d 1228, 1233-34 (1st Cir. 1991); *Friedman v. Presser*, 929 F.2d 1151, 1155 (6th Cir. 1991); *Schnabel v. Wells*, 922 F.2d 726, 728 (11th Cir. 1991); *McDonald v. United States*, 898 F.2d 466, 468 (5th Cir. 1990); *Geiger v. Allen*, 850 F.2d 330, 332 n.3 (7th Cir. 1988); *Young v. Mt. Hawley Ins. Co.*, 864 F.2d 81, 82 (8th Cir. 1988); *Green v. Humphrey Elevator and Truck Co.*, 816 F.2d 877, 882 (3d Cir. 1987); *Combs v. Nick Garin*

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[14] The Ninth Circuit also considered "whether a failed attempt at service under subsection (ii) of Rule 4 (c)(2)(C) is nonetheless valid under subsection (i) if it satisfies state law requirements." *Id.*, 960 F.2d at 852. It concluded that a second mailing was required, since the only sanction under subsection (ii) for failing to return an acknowledgment was payment of the costs of personal service, not a default judgment without further notice. *Id.* at 852-53.

Trucking, 825 F.2d 437, 443 (D.C. Cir. 1987); *Stranahan Gear Co. v. NL Industries*, 800 F.2d 53, 56 (3d Cir. 1986); *Armco, Inc. v. Penrod-Stauffer Bldg. Sys., Inc.*, 733 F.2d 1087, 1088-89 (4th Cir. 1984).

The only circuit to decide the return of a signed acknowledgment is not essential appears to be the Second, and that was in a case in which the mail was actually received, though not acknowledged. *See Morse v. Elmira Country Club*, 752 F.2d 35, 39 (2d Cir. 1984).[15]

Decisions under state statutes authorizing service of process by mail with a return receipt signed by either the addressee or the addressee's agent nearly unanimously hold that a return receipt signed by neither is inadequate. By requiring delivery either to the person to be served or to that person's designated representative, courts have avoided reaching the due process issues noted in *Wise*.[16]

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[15] *Morse*'s holding that former Rule 4(c)(2)(C)(ii) did not require the defendant to return the acknowledgment of service has been rejected by other circuits. *See, e.g., Adatsi v. Mathur*, 934 F.2d 910, 911 (7th Cir. 1991) ("*Morse* is an outlier, and we reject it."); *Friedman*, 929 F.2d at 1155; *Media Duplication Services*, 928 F.2d at 1233-34; *Worrell*, 845 F.2d at 841.

[16] *See Lampe*, 952 F.2d at 701 (service ineffective under Pennsylvania law where no showing made that signatures on return receipts were those of authorized agents); *Ex Parte Shuttleworth*, 410 So.2d at 900 (return receipt signed by father of party insufficient when father not authorized to receive summons), *cert. denied*, 466 U.S. 950, 80 L.Ed.2d 537 (1984); *Cole*, 800 S.W.2d at 414 (return receipt signed by stepdaughter inadequate because she was not authorized agent pursuant to postal regulations); *Roberts*, 359 N.E.2d at 620 (return receipt signed by husband insufficient); *Administrators of Tulane Educational Fund*, 475 So.2d at 764 (return receipt signed by librarian at college where defendant worked, who was not designated to receive mail for defendant but merely to sort it for school, inadequate); *Guen*, 381 A.2d at 724-25 (return receipt not signed by defendant or his representative inadequate despite actual notice); *Bucholz*, 153 F.Supp. at 68 (return receipt signed by unauthorized person

Service by mail statutes requiring restricted delivery have also been strictly construed. Any deviation from the specified procedures invalidates service.[17]

Apart from the decision at issue in this case, petitioner has been able to locate only two decisions holding that service of process by registered or certified mail is adequate even though a person other than the addressee or the addressee's authorized agent signs the return receipt, and no actual notice is received. Both decisions involved notice received by an employee of the person to be served. One decision also involved small claims court. In *Dobrowolski*, a return receipt signed by defendant's employee was held sufficient to confer jurisdiction in a small claims court proceeding, since the rules did not

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insufficient under Montana law); *Oak Island Southwind Realty*, 366 S.E.2d at 491-92 (notice of summary judgment motion sent by certified mail to defendant in care of company not shown to be agent inadequate); *Hudson*, 519 A.2d at 321 (return receipt signed by employee insufficient where employee not agent for defendants); *Southgate Shopping Center Corp.*, 361 N.E.2d at 463 (return receipt signed by person at same address but not authorized to receive service for defendant inadequate); *Rocky Mtn. Adjustment Co.*, 604 P.2d at 923 (return receipt signed by neither addressee nor addressee's agent insufficient); *Larry M. Rosen & Associates, Inc.*, 465 A.2d at 1117 (return receipt signed by receptionist for defendant law firm insufficient when no showing made that receptionist was agent); *Oedekoven*, 475 P.2d at 308 (service defective when return receipt signed by minor at defendant's address).

[17] *See Masri*, 595 A.2d at 399, 401-02 (service defective because return receipt, though signed in box marked "Signature-Addressee," not signed with addressee's name); *Ingrassia*, 509 N.E.2d at 742 (certified mail service ineffective if no signed receipt); *Esterdahl*, 110 N.W.2d at 243-44 (requirement for restricted certified mail not satisfied by delivery to defendant's wife); *Lydick*, 266 N.W.2d at 211 (service inadequate when registered receipt returned unsigned); *Edwards*, 801 P.2d at 786 (service of summons by mail is not adequate "unless receipt is acknowledged by defendant.").

require restricted delivery and "the rules governing small claims actions are designed to provide an expeditious as well as a simplified and inexpensive procedure for the handling of small claims. *Id.*, 348 N.E.2d at 239. In *Capstar Corp. v. Pristine Industries, Inc.*, 768 F. Supp. 518 (W.D.N.C. 1991), the signature in the agent box of the certified mail receipt was illegible, but the court denied a motion to quash service since "some person at Defendant's business received the summons and complaint. *Id.* at 521. In that case, however, relief from default was granted due to the "oversight on the part of Defendant's clerical personnel." *Id.* at 522. Unlike the present case, the defendant there was not deprived of the opportunity to defend on the merits.

Here, California's statutes specify service by registered or certified mail, and DMV used certified mail in this case. But Postal Service procedures for delivery of certified mail were not followed. Those procedures require delivery to the person to whom the mail is addressed, or to that person's designated agent. "Certified mail not restricted in delivery is delivered to the addressee or addressee's authorized representative." DMM § 912 3.1.

Here, as in *Wise*, "the record fails to show exactly the things which it should show, in order to comply . . . with the requirements of due process." *Id.*, 114 F.2d at 491. Admittedly, it was not DMV's fault that the mail carrier misdelivered the mail. But it was also not the fault of Mr. Evans. Had the Postal Service regulations been followed, he or his authorized agent would have received notice.

Between DMV and Mr. Evans, due process requires that the responsibility be placed on DMV, as the party responsible for accomplishing effective service. This is particularly true here, since DMV, in fact, received a return receipt with an addressee's signature which was clearly erroneous. As stated in *Roberts*, 359 N.E.2d at 619-20, where the court held that service on the defendant's husband was insufficient, "justice is best served by thrusting the risk of the Postal Service's misfeasance

upon the parties who elected to utilize [certified mail]. . . . "

C. While actual notice may avoid due process violations, there was no actual notice in this case.

Actual notice to the person to be served of course eliminates any due process concern. When actual notice is received, any failure to provide service by mail in strict compliance with statutory requirements is, as a constitutional matter, irrelevant. In *Morse*, for example, service was held to be sufficient even though defendant failed to acknowledge service, because the defendant actually received the mail. *Id.*, 752 F.2d at 40. More recently, in *Sarit v. U.S. Drug Enforcement Admin.*, 987 F.2d 10 (1st Cir. 1993), *cert. denied* ___ U.S. ___, 126 L.Ed.2d 195, a notice of forfeiture sent by certified mail was returned "unclaimed," but notice was actually given to appellant's counsel that forfeiture proceedings were pending and that appellant could file a claim. *Id.* at 12. The appeals court found that statutory requirements were satisfied, *id.* at 13, and that no due process violation occurred because appellant had actual notice. *Id.* at 15 n.3. The court further found that no "exceptional circumstances" compelled DEA to attempt service other than the statutory minimum. *Id.* at 15.[18]

Similarly, in *Hill*, the court found no due process violation when the return receipt for certified mail was signed by a person other than defendant while defendant was on vacation. The defendant, an attorney, was notified

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[18] Although not expressly discussed in *Sarit*, there, the notice was returned "unclaimed," possibly indicating that appellant contributed to the non-delivery. Here, to the contrary, the notice was delivered to the wrong person, as DMV knew, and petitioner was not responsible for this error. This case presents the "exceptional circumstances" absent in *Sarit* and the "extraordinary case" predicted in *Mullane*, 339 U.S. at 319, 94 L.Ed. at 876.

of the legal malpractice action, acknowledged receiving the summons and complaint, and filed a summary disposition motion. *Id.*, 400 N.W.2d at 329. *See also Cox*, 589 S.W.2d at 607 (defendant's corporate process agent received the registered mail and gave actual notice to defendant); *Stonewall Ins. Co.*, 325 N.W.2d at 136 (certified mail sent to parents' residence and to APO box of defendant in military service sufficient since defendant "did personally receive the certified mail containing the suit papers."); *Akron-Canton Regional Airport Auth.*, 406 N.E.2d at 814-15 (service by certified mail to business address used only sporadically did not comport with due process, but appearance by defendant was consent to personal jurisdiction); *Jacobson*, 408 S.E.2d at 246-47 (service under long-arm statute valid when return receipt signed by another person and defendant disclosed in letter to plaintiff that he received summons and complaint); *Olin Industries, Inc. v. N.L.R.B.*, 192 F.2d 799, 799 (5th Cir. 1951) (ordinary mail instead of certified mail sufficient because actual notice given), *cert. denied*, 343 U.S. 919, 96 L.Ed.2d 1332 (1952).

But here, unlike the cases excusing defective mail service because of actual notice, not only were the Postal Service procedures for certified mail not followed, but no actual notice was ever received by Mr. Evans before the default hearing was held and his business license was revoked.

The Due Process Clause requires that absent actual notice, if service by mail is used to obtain personal jurisdiction and the mail is not delivered to the addressee or an authorized agent, the service must be held invalid. Mail never delivered to a defendant or his or her representative is constitutionally insufficient to confer jurisdiction unless *"the notice in fact came to the attention of the addressee. . . . " Wise*, 114 F.2d at 490 n.16 (emphasis by court, quoting service rule).

Where, as here, a defective delivery of certified mail is combined with a lack of actual notice, due process is

denied. The default decision must be deemed a nullity and vacated. *Id.* at 489-91.

III

IF SERVICE WAS INADEQUATE TO CONFER PERSONAL JURISDICTION, THE SLATE MUST BE WIPED CLEAN AND A HEARING DE NOVO GRANTED

As soon as Mr. Evans learned of the decision to revoke his license, he requested reconsideration. DMV agreed that "good cause has been shown why said Decision should be reconsidered; . . . " CT 155. In fact, DMV ordered that "the Decision in the above-entitled matter be set aside. . . . " *Id.*

However, DMV never eliminated its original determination that sufficient cause existed to revoke Mr. Evans' license. Instead, DMV afforded Mr. Evans only a limited rehearing "for the sole purpose of allowing [Mr. Evans] to offer evidence in extenuation and mitigation concerning the facts and circumstances of the violations and the appropriate license discipline." *Id.* The only issue at the second hearing was whether the harshest possible penalty of license revocation should be imposed.

Mr. Evans was not given a hearing de novo; he was denied any opportunity to present evidence as to lack of notice or to challenge DMV's prior decision finding that violations existed warranting license revocation. Mr. Evans was never allowed to be heard on the merits, to confront adverse witnesses, or to present evidence to contradict the charges against him.

This Court addressed a similar situation in *Armstrong v. Manzo*, 380 U.S. 545, 14 L.Ed.2d 62 (1965). There, a state court had entered an adoption order without prior notice to the father of the child. After receiving notice, the father moved to vacate. The court did not vacate the adoption order, but allowed the father to present evidence as to why the adoption order should be set aside. This limited rehearing did not cure the due process violation, this Court held, because in the second hearing the burden was

placed on the father to overcome the prior adverse ruling. The trial court's failure "to set aside the decree and consider the case anew" denied him due process. *Id.*, 380 U.S. at 552, 14 L.Ed.2d at 66.

> Had the petitioner been given the timely notice which the Constitution requires, the [adoptive parents] would have had the burden of proving their case as against whatever defenses the petitioner might have interposed. . . . [¶] Instead, the petitioner was faced on his first appearance in the courtroom with the task of overcoming an adverse decree entered by one judge, based upon a finding of non-support made by another judge. . . . [T]hese burdens would not have been imposed upon him had he been given timely notice in accord with the Constitution.

Id., 380 U.S. at 551, 14 L.Ed.2d at 66.

Here, similarly, DMV had the initial burden of proving grounds warranting revocation of Mr. Evans' license. Automobile dismantler licenses can be taken away only after a "determination that the person to whom the license was issued is not lawfully entitled thereto or has done [specified acts]. . . . " Cal. Veh. Code § 11509(a) (West Supp. 1994). DMV had to prove that grounds for license revocation existed. If Mr. Evans had been given adequate notice of the first hearing, he could have contested the evidence introduced by DMV, and presented his own contradictory evidence.

DMV's decision to limit the second hearing to mitigating or extenuating circumstances, and its refusal to consider anew whether violations existed which justified revocation, failed to cure the lack of constitutionally effective notice for the first hearing. Due process required DMV to place Mr. Evans in the same position he would have been in had the default hearing not been held.

> A fundamental requirement of due process is "the opportunity to be heard." [Citation omitted.] It is an opportunity which must be granted

> at a meaningful time and in a meaningful manner. The trial court could have fully accorded this right to the petitioner only by granting his motion to set aside the decree and consider the case anew. Only that would have wiped the slate clean. Only that would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place.

Armstrong, 380 U.S. at 552, 14 L.Ed.2d at 66-67.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted to review the decision of the Court of Appeal, Third Appellate District, State of California.

DATED: June 27, 1994

Respectfully submitted,

EISEN & JOHNSTON LAW CORPORATION

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Attorneys for Petitioner
James M. Evans

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APPENDIX

APPENDIX A

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SUPERIOR COURT OF THE STATE OF CALIFORNIA COUNTY OF SACRAMENTO

JAMES M. EVANS, dba RIO LINDA AUTO WRECKERS and A TO Z AUTO DISMANTLERS, Petitioner, v. DEPARTMENT OF MOTOR VEHICLES, of the State of California, and A. A. PIERCE individually and in his capacity as Director of Motor Vehicles, Respondents.	NO. 364057 **JUDGMENT**

This matter came on for hearing pursuant to petition for writ of mandate on March 22, 1991, in Department 16 of this court, the Honorable Cecily Bond, Judge of the Superior Court, presiding. Jay-Allen Eisen and Paul

Nicholas Boylan of Jay-Allen Eisen Law Corporation appeared for petitioner. Daniel E. Lungren, Attorney General of California, by Susan Underwood, Deputy Attorney General, appeared for respondents. After considering the pleadings and exhibits filed by all parties and the arguments of counsel and good cause appearing.

IT IS ORDERED, ADJUDGED AND DECREED that:

1. In revoking Mr. Evans's automobile dismantler's license and special plates, respondents denied Mr. Evans due process, acted in excess of their jurisdiction, failed to afford Mr. Evans a fair trial, failed to proceed in the manner required by law, and abused their discretion in refusing to consider Mr. Evans's objection, made in a December 11, 1989 letter and at the February 16, 1990 hearing, that he had not been served the accusation and notice of hearing required by Government Code §§ 11507 and 11510 prior to the default hearing at which Mr. Evans's dismantler's license and special plates were revoked, and in granting Mr. Evans a limited rehearing at which he was only permitted to produce evidence in mitigation or extenuation but was not permitted to examine and cross-examine witnesses and present a defense to the charges on which his dismantler's license and special plates were revoked.

2. This court's peremptory writ of mandate shall issue commanding respondents and each of them:

> A. To set aside the Department of Motor Vehicles director's orders of November 7, 1989 and April 5, 1990, revoking Mr. Evans's automobile dismantler's license and special plates;

B. To reinstate Mr. Evans's automobile dismantler's license and special plates forthwith, and not to interfere with Mr. Evans's use and enjoyment of the license and special plates without first providing him notice of any proceedings that would effect use and enjoyment of the license through service of an accusation and notice of hearing;

C. If respondents intend to pursue the charges on which Mr. Evans's automobile dismantler's license and special plates were revoked, respondents shall conduct a hearing after due service of notice of the time and place of the hearing, at which the department shall have the burden or present evidence supporting any charges against Mr. Evans and at which Mr. Evans has the opportunity to produce evidence to rebut the department's showing. The hearing will decide all issues pertaining to the revocation of Mr. Evans's license and special plates including the issue of whether Mr. Evans received proper notice of the August 14, 1989 hearing;

D. To make and file a return to the writ of mandate in this court within 60 days following service of the writ of mandate setting forth what they have done to comply.

Dated: May 24, 1991

Cecily Bond
JUDGE OF THE
SUPERIOR COURT

APPENDIX B

CERTIFIED FOR PUBLICATION

COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento County)

JAMES M. EVANS Plaintiff and Respondent, v. DEPARTMENT OF MOTOR VEHICLES, et al., etc., Defendants and Appellants.	3 Civil No. C011373 & C012371 (Super.Ct.No. CV364057)

APPEAL from an order of the Superior Court of Sacramento County, Cecily Bond, Judge. Reversed.

Daniel E. Lungren, Attorney General, Robert Mukai, Chief Assistant Attorney General, Floyd D. Shimomura, Assistant Attorney General, Linda A. Cabatic, Susan P. Underwood and Geoffrey L. Graybill, Deputy Attorneys General, for Defendants and Appellants.

Law Office of Daniel Robert Lang, and Eisen & Johnston Law Corporation, Jay-Allen Eisen, Marian M. Johnston, Karen Leaf, and Ann Perrin Farina, for Plaintiff and Respondent.

The Department of Motor Vehicles (DMV) and its director, A.A. Pierce, appeal from the trial court's issuance of a peremptory writ of mandate setting aside DMV's order revoking the automobile dismantler's license of James M. Evans, doing business as Rio Linda Auto Wreckers and A to Z Auto Dismantlers, and from the court's subsequent order awarding attorney fees to Evans pursuant to Code of Civil Procedure section 1028.5 or, alternatively, Government Code section 800. Evans appeals from the trial court's order denying an award of attorney fees pursuant to the federal Civil Rights Act (42 U.S.C. § 1988).

The key issues presented in this appeal are (1) whether California's statutory scheme for serving notice of an accusation and hearing seeking to revoke an automobile dismantler's license is reasonably calculated to give the licensee notice of the accusation and hearing and, thus, satisfies due process of law, and (2) whether DMV abused its discretion in rejecting Evans's claim that his default should be set aside on the ground that, although the notice was in fact delivered to his established place of business, he did not receive it.

The trial court concluded that, even though DMV complied with the statutory scheme and the notice was delivered to Evans's business, the statutory scheme is unconstitutional as applied to the facts of this case because Evans did not receive actual notice of the proceeding (a person residing on the business property received the notice in the mail but allegedly failed to give it to Evans) and DMV did not provide Evans with a hearing to establish lack of actual notice.

We agree with DMV that the trial court erred in so ruling. As we shall explain, the statutory scheme for serving notice of a disciplinary proceeding by certified mail at the dismantler's established place of business satisfies due process because it is reasonably calculated to provide the dismantler with notice of the proceeding. That the dismantler allegedly did not receive the notice which was served at the place of business does not render the statutory scheme unconstitutional because actual notice is not a necessary element of proper service in a disciplinary proceeding. Even though the service complied with due process of law, DMV nevertheless had discretion to grant relief from default upon an adequate showing that Evans did not in fact receive notice of the accusation and hearing. However, the bare, unsworn allegation in Evans's petition for reconsideration alleging he did not receive notice, unaccompanied by any showing that the lack of notice was not due to his avoidance of service or inexcusable neglect, was insufficient to compel DMV to set aside Evans's default. Consequently, we shall reverse the trial court's order granting a peremptory writ of mandate, and will direct the court to enter a new and different order denying Evans's petition. Because Evans no longer is the prevailing party, we shall reverse the award of attorney fees.

FACTS AND PROCEDURAL BACKGROUND

On May 24, 1989, DMV issued an accusation against Evans, alleging numerous violations of statutes and regulations governing automobile dismantling, and seeking to suspend or revoke his automobile dismantler's license. The accusation, along with a notice of hearing, was

served by certified mail at the address of record for Evans's established place of business, 6715 West Sixth Street in Rio Linda, California. The return receipt which had two signature lines, one marked "address" and the other marked "agent," was signed by Linda Courtain on the line marked "address."

On August 14, 1989, the evidentiary hearing was held before an administrative law judge. Evans did not appear at the hearing. On November 7, 1989, DMV issued its decision revoking Evan's license. On November 15, 1989, a copy of the decision was served by certified mail at Evan's business address. The return receipt was signed by Evans's wife on the line marked "address."

On December 11, 1989, Evans wrote to DMV requesting reconsideration of its decision on the ground he did not receive notice of the hearing. DMV set aside the decision revoking Evans's license and remanded the matter "not for a hearing de novo but for the sole purpose of allowing [Evans] to offer evidence in extenuation and mitigation" concerning the appropriate license discipline.

At the rehearing, Evans's attorney asked to have a hearing de novo "on all matters" (including the threshold issue whether Evans's businesses had violated the law) because Evans had not received notice of the first hearing. DMV's counsel responded that, since DMV had limited the rehearing to production of evidence in mitigation or extenuation concerning the appropriate discipline, Evans was not entitled to attack the findings made at the previous hearing that Evans had violated applicable statutes and regulations governing automobile dismantlers.

The administrative law judge agreed with DMV and restricted the hearing accordingly.

Following the rehearing, the administrative law judge found Evans had not shown sufficient mitigation or extenuation to modify the original order revoking his license. This decision was adopted by DMV. On May 7, 1990, a DMV agent demanded that both of Evans's businesses, Rio Linda Auto Wreckers and A to Z Auto Dismantlers, cease operation at noon and that Evans turn over all his books and records to DMV.

Evans then filed a petition for writ of mandate pursuant to Code of Civil Procedure section 1094.5 and 42 United States Code section 1983. He argued that DMV revoked his license without proper notice and hearing, thereby violating his right to due process under both the Fourteenth Amendment to the United States Constitution and article I, section 7 of the California Constitution.

In his declaration in support of the petition, Evans stated he did not receive a copy of the accusation and notice of hearing prior to the administrative hearing on August 14, 1989. He declared the property used by Rio Linda Auto Wreckers at 6715 West Sixth Street in Rio Linda is a ten-acre parcel with five structures on it: a small cottage at the front of the property adjacent to West Sixth Street, a garage directly behind the cottage, an office building, and two storage sheds. Until July 1989, mail for Rio Linda Auto Wreckers was delivered to a mailbox across the street. Linda Courtain, who signed the return receipt, resided in the small cottage on the property with her brother, Ralph Bettes. Bettes was employed by Rio Linda Auto Wreckers between February 1985 and

July 1989. According to Evans, neither Bettes nor Courtain was authorized to receive mail on behalf of Evans or his businesses. Evans claimed that no one gave him the accusation and notice of hearing. He did not learn of the hearing until November 24, 1989, when he received a copy of DMV's decision to revoke his license. He declared he had never been given an opportunity to be heard on the merits of the charges contained in the accusation.

DMV retorted that it properly provided notice of the accusation and hearing in compliance with Government Code sections 8311 and 11505, subdivision (c), which permit service by registered or certified mail where, as here, a statute or agency rule requires the respondent to file his or her address with the agency and to notify the agency of any change in address. DMV argued that Evans failed to provide DMV with a complete address which would prevent the accusation from being served at the wrong structure at Evans's place of business. Hence, it was Evans's fault he did not receive notice.

The trial court granted Evans's petition for a writ of mandate, ruling as follows: "[G]iv[en] the circumstances of this particular case the[y] seem to be somewhat unique. I believe service was not properly [e]ffected, and consequently, I think the writ should be granted, and [DMV] should be directed to conduct a new hearing with respect to all issues, including the issue of whether service was properly obtained and received and the excuses for that . . . [¶] So, I will grant the writ on the grounds there has been improper and not sufficient notice in this particular case given the peculiar facts of this case, and so, it's unconstitutional as applied in this case. [¶] I am

not making a blanket decision that the certified or registered mail procedure is unconstitutional, per se. I don't think the Court needs to reach that issue on the facts of this case."

The trial court's earlier comments at the hearing on Evans's petition for writ of mandate indicate the court believed (1) that where, as here, the return receipt showed the accusation and notice was received by someone other than the licensee or the licensee's agent, the burden was on DMV to ensure that the licensee, Evans, received actual notice of the hearing "before a substantial right is taken," (2) that DMV should have provided Evans with a hearing on whether he actually received the notice served by certified mail at his established place of business, and (3) that DMV denied Evans a fair hearing by providing only a limited rehearing in which he could produce evidence of mitigation but could not present a defense to the charges upon which the discipline was based.

The court subsequently awarded Evans $7,500 in attorney fees pursuant to Code of Civil Procedure section 1028.5 or, alternatively, Government Code section 800, but denied an award of attorney fees under 42 U.S.C. section 1988.

DISCUSSION

DMV contends the trial court erred in concluding that the statutory scheme governing DMV's service of the accusation and notice of hearing is unconstitutional as applied to this case on the ground that evidence presented at the hearing on the writ petition indicated Evans

never received the notice served by DMV, and DMV did not give Evans a hearing to determine whether he actually received the notice. Accordingly to DMV, despite Evan's claim that he did not personally receive the notice DMV served by certified mail at his business address, said service complied with statutes governing service of accusations seeking revocation of an automobile dismantler's license and satisfied due process of law. We agree.[1]

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present

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[1] In reviewing an administrative decision made after a hearing, the superior court must determine whether the administrative agency "has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the [administrative agency] has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." (Code Civ. Proc., § 1094.5, subd. (b).) When an administrative decision substantially affects a fundamental vested right, such as the revocation of a professional license, the independent judgment standard of review applies. (*Berlinghieri v. Department of Motor Vehicles* (1983) 33 Cal. 3d 392, 395-396; *Terry York Imports, Inc. v. Department of Motor Vehicles* (1987) 197 Cal.App.3d 307, 311-312.) The superior court must examine the administrative record for errors of law and exercise its independent judgment upon the evidence. (*Ibid.*; Code of Civil Proc., § 1094.5, subd. (c).) The appellate court must sustain the superior court's factual findings if substantial evidence supports them. (*Pasadena Unified Sch. Dist. v. Commission on Professional Competence* (1977) 20 Cal.3d 309, 314.)

their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance. But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied . . . [¶] . . . The means employed [to give notice to interested parties] must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected. . . . " (*Mullane v. Central Hanover B. & T. Co.* (1950) 339 U.S. 306, 314-315 [94 L.Ed. 865, 873-874], citations omitted.)

Mullane makes it clear that due process of law does not require actual notice, but only a method reasonably certain to accomplish that end. (339 U.S. at p. 319 [94 L.Ed. at p. 876]; *Conservatorship of Wyatt* (1987) 195 Cal.App.3d 391, 395; *Chesney v. Gresham* (1976) 64 Cal.App.3d 120, 129.) "If the form of substituted service is reasonably calculated to give an interested party actual notice of the proceedings and an opportunity to be heard, the traditional notions of fair play and substantial justice implicit in due process are satisfied." (*M. Lowenstein & Sons, Inc. v. Superior Court* (1978) 80 Cal.App.3d 762, 768.)

As we shall explain, our review of California's statutory method for serving notice of an accusation and hearing seeking to revoke an automobile dismantler's license leads us to conclude that the method is reasonably calculated to give the licensee notice of the accusation and hearing and, thus, satisfies due process of law.

Automobile dismantling is a closely regulated industry for the protection of the public. (*People v. Shope* (1982) 128 Cal.App.3d 816, 823-824; *People v. Easley* (1979) 90 Cal.App.3d 440, 445.) As such, an automobile dismantler is subject to strict compliance with numerous statutes and regulations (see Veh. Code, §§ 11500 et seq. and statutes set forth in § 11509; Cal.Code Regs., tit. 13, § 413.01 et seq.), including the requirement that the dismantler keep DMV apprised of the location of his or her established place of business. (Veh. Code, § 11513.) The address notification requirement is essential to DMV's ability to closely scrutinize and regulate the dismantler's activities. It notifies DMV where notices may be sent, (Gov. Code, § 11505, subd. (c); Veh. Code, § 11513), where DMV may inspect vehicles in the dismantler's possession (Veh. Code, §§ 1655, 10656), as well as where pertinent records, which are subject to inspection by DMV, are maintained. (Veh. Code, §§ 320, subd. (b), 11505, subd. (c); Cal.Code Regs., tit. 13, §§ 413.07, 413.08.)

In addition to the address notification requirement, the dismantler is required to erect a 32-square-foot sign "providing information relating to the automobile dismantler's name and the location and address of his established place of business so as to enable any person doing business with such automobile dismantler to identify him properly." (Veh. Code, § 11514.) The sign "shall be of a permanent nature, erected on the exterior of the office or the dismantling area, and constructed or painted so as to withstand reasonable climatic effects." (Cal.Code Regs., tit. 13, § 413.02.)

Vehicle Code section 11509, subdivisions (a) and (b) provide that, after notice and hearing, DMV may suspend

or revoke the license issued to an automobile dismantler if DMV determines the licensee committed certain enumerated acts.[2] The means of providing notice of an accusation and hearing is set forth in Government Code section 11505, subdivision (c), which applies to automobile dismantler license revocation hearings. (Veh. Code, § 11509, subd. (c).)[3]

Government Code section 11505, subdivision (c) provides: "The accusation and all accompanying information may be sent to respondent by any means selected by the agency. But no order adversely affecting the rights of the respondent shall be made by the agency in any case unless the respondent shall have been served personally *or by registered mail as provided herein,* or shall have filed a notice of defense or otherwise appeared. Service may be proved in the manner authorized in civil actions. *Service by registered mail shall be effective if a statute or agency rule requires respondent to file his address with the agency and to*

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[2] Vehicle Code section 11509 provides in pertinent part: "(a) The department, after notice and hearing, may suspend or revoke the license issued to an automobile dismantler upon the determination that the person to whom the license was issued is not lawfully entitled thereto or has done any of the following: . . . [¶] (b) Any of the causes specified in this chapter as a cause for refusal to issue a license to an automobile dismantler applicant is cause, after notice and hearing, to suspend or revoke a license and special plates issued to an automobile dismantler."

[3] Vehicle Code section 11509, subdivision (c) states: "Except as provided in Section 11509.1, every hearing provided for in this chapter shall be held pursuant to Chapter 5 (commencing with Section 11500) of Part I of Division 3 of Title 2 of the Government Code."

notify the agency of any change, and if a registered letter containing the accusation and accompanying material is mailed, addressed to respondent at the latest address on file with the agency." (Italics added.)

As we have noted, Vehicle Code section 11513 requires an automobile dismantler to keep DMV apprised of the location of the dismantler's established place of business.[4] The established place of business is the place where the dismantler keeps his or her books and records. (Veh. Code, § 320.)[5] In accordance with Government Code

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[4] Vehicle Code section 11513 provides: "(a) The department shall not issue an automobile dismantler's license to any applicant for that license who has not an established place of business as defined in this code. If the automobile dismantler changes the site or location of his or her established place of business, he or she shall immediately upon making the change notify the department. If the automobile dismantler, for any reasons ceases to be in possession of an established place of business from and on which he or she conducts the business for which he or she is licensed, he or she shall immediately notify the department and, upon demand by the department, shall deliver to the department the automobile dismantler's license, and all books and forms provided by the department in his or her possession. [¶] (b) Any person licensed under this chapter who has closed his or her established place of business may be served with process issued pursuant to Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code by registered mail at that place of business, unless the person has notified the department in writing of another address where service may be made."

[5] Vehicle Code section 320 provides in pertinent part: " 'Established place of business' is a place actually occupied either continuously or at regular periods by any of the following: . . . [¶] (b) An automobile dismantler where the books and records pertinent to the type of business being conducted are kept. . . . "

section 8311, service by certified mail at the automobile dismantler's established place of business shall be deemed sufficient compliance with any requirement that notice be provided by registered mail.[6]

DMV correctly contends that its service of the accusation and notice of hearing on Evans via certified mail sent to his established place of business in compliance with Government Code sections 11505 and 8311 satisfied due process of law. As specified above, these sections provide that, where a party is required to file his or her address with an agency, service by certified mail "shall be effective . . . if a [certified] letter containing the accusation and accompanying material is mailed, addressed [to the party] at the latest address on file with the agency." The statute does not require proof of service in the form of a return receipt signed by the party or other acknowledgment of receipt by the party, unlike other statutes governing service by mail. (See e.g. Code Civ. Proc., §§ 415.30, 415.40, 417.10, 417.20; see also *Johnson & Johnson v. Superior Court* (1985) 38 Cal.3d 243, 255; *Taylor-Rush v. Multitech Corp.* (1990) 217 Cal.App.3d 103, 110; *Neadeau v. Foster* (1982) 129 Cal.App.3d 234, 237.)

The statutory scheme governing notice to automobile dismantlers is analogous to that which applies in State Bar cases concerning attorney discipline. An attorney is

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[6] Government Code section 8311 provides: "Wherever any notice or other communication is required by any law to be mailed by registered mail to or by the state, or any officer or any agency thereof, the mailing of such notice or other communication by certified mail shall be deemed to be a sufficient compliance with the requirements of such law."

required to keep the State Bar apprised of his or her current office address. (Bus. & Prof. Code, § 6002.1, subd. (a).) A notice initiating a disciplinary proceeding "may be served upon the member or former member of the state bar to whom it is directed by certified mail, return receipt requested, addressed to the member or former member at the latest address shown on the official membership records of the State Bar. The service is complete at the time of the mailing. . . . " (Bus. & Prof. Code, § 6002.1, subd. (c).) The California Supreme court has determined that proper service is effected by mailing a notice in compliance with section 6002.1, subdivision (c). (*Middleton v. State Bar* (1990) 51 Cal.3d 548, 559.) Actual notice is not a necessary element of proper service in disciplinary proceedings (*id.*, at p. 558), even where the failure to receive notice is not the attorney's fault. (*Id.*, at p. 559.)

Likewise, we conclude that an accusation and notice of hearing sent to an automobile dismantler by certified mail at his or her established place of business is reasonably calculated to provide the dismantler with actual notice of the proceedings against the dismantler. An automobile dismantler is presumed to be aware of the statutes and regulations governing his or her business. Therefore, the dismantler knows that he or she must keep DMV apprised of the location of the dismantler's business and that he or she may receive important notices and communications from DMV at this address. The dismantler is in the best position to ensure the receipt of such notices by providing DMV with the most complete address available, a matter within the dismantler's knowledge. (Cf. *National Equipment Rental, Ltd. v. United Lumber Co.* (1972)

24 Cal.App.3d 1012, 1016-1017.) Furthermore, the dismantler has control over who lives or works at the premises. The dismantler can ensure that these residents or employees are responsible persons and can impress upon them the importance of bringing to the dismantler's attention any notices received from DMV. Hence, a certified letter mailed to the address provided by the dismantler and clearly designated by the sign required by Vehicle Code section 11514 is reasonably calculated to provide actual notice to the dismantler as the chances of misdelivery are minimal.

Here, the return receipt and DMV's certificate of service by certified mail disclosure that DMV complied with the procedure for constructive service set forth in Government Code section 11505, subdivision (c) and show that the notice of accusation and hearing concerning Evans's license was delivered to his established place of business by certified mail. Consequently, DMV obtained in personal jurisdiction over Evans (*Tandy Corp. v. Superior Court* (1981) 117 Cal.App.3d 911, 913) and provided him with notice reasonably calculated, under all the circumstances, to apprise him of the pendency of the proceedings against his license so as to afford him an opportunity to be heard.

The fact that Evans allegedly did not receive the notice personally, and thus did not attend the hearing, does not mean the notice deprived him of due process. As we have noted, due process of law does not require actual notice, but only a method reasonably certain to accomplish that end. (*Mullane, supra,* 339 U.S. at p. 319 [94 L.Ed. at p. 876]; *Wyatt, supra,* 195 Cal.App.3d at p. 395; *Chesney, supra,* 64 Cal.App.3d at p. 129.)

Evans suggests that DMV's proof of mailing creates only a presumption the mail was delivered (Evid. Code, § 641 [a letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail]) and that he presented evidence to rebut this presumption by showing the accusation and notice of hearing were not delivered to Evans or his agent. This argument misses the point. It is unquestioned that the certified mail was in fact delivered to Evans's established place of business. That Evans did not personally receive the accusation and notice of hearing does not establish lack of proper notice because, as we have explained, the statutory scheme requires only notice by registered or certified mail to the licensee's established place of business — not to the licensee personally — and such notice satisfies due process of law because it is reasonably calculated to provide the licensee with notice.

Evans has cited no authority, and we have found none, for the proposition that, absent a statutory requirement of actual service on the licensee or agent thereof, service which is reasonably calculated to provide a licensee with notice of an accusation or hearing fails to satisfy due process of law simply because the licensee claims that, although the notice was in fact served, the licensee or agent never received it personally.

Hence, the trial court erred in concluding that DMV's service of the accusation and notice of hearing by certified mail to Evans's established place of business deprived Evans of his constitutional right to due process of law.

This does not end our inquiry because, even though DMV's service of the accusation and notice of hearing

complied with the law and was consistent with due process, DMV nonetheless had discretion to grant relief from default (Gov. Code, § 11506)[7] and reconsider its decision (Gov. Code, § 11521)[8] based upon a showing that Evans

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[7] Government Code section 11506 provides in pertinent part: "(a) Within 15 days after service upon him of the accusation the respondent may file with the agency a notice of defense. . . . [¶] (b) The respondent shall be entitled to a hearing on the merits if he files a notice of defense, and any such notice shall be deemed a specific denial of all parts of the accusation not expressly admitted. Failure to file such notice shall constitute a waiver of respondent's right to a hearing, but the agency in its discretion may nevertheless grant a hearing . . . "

[8] Government Code section 11521 provides in pertinent part: "(a) The agency itself may order a reconsideration of all or part of the case on its own motion or on petition of any party. The power to order a reconsideration shall expire 30 days after the delivery or mailing of a decision to respondent, or on the date set by the agency itself as the effective date of the decision if that date occurs prior to expiration of the 30-day period or at the termination of a stay of not to exceed 30 days which the agency may grant for the purpose of filing an application for reconsideration. If additional time is needed to evaluate a petition for reconsideration filed prior to the expiration of any of the applicable periods, an agency may grant a stay of that expiration for no more than 10 days, solely for the purpose of considering the petition. If no action is taken on a petition within the time allowed for ordering reconsideration, the petition shall be deemed denied. [¶] (b) The case may be reconsidered by the agency itself on all the pertinent parts of the record and such additional evidence and argument as may be permitted, or may be assigned to an administrative law judge. A reconsideration assigned to an administrative law judge shall be subject to the procedure provided in section 11517. If oral evidence is introduced before the agency itself, no agency member may vote unless he or she heard the evidence."

had not received actual notice of the accusation and hearing.

In its written order, the trial court held that DMV "abused its discretion in refusing to consider Mr. Evans's objection, made in a December 11, 1989 letter and at the February 16, 1990 hearing, that he had not been served with the accusation and notice of hearing . . . prior to the default hearing at which [his] dismantler's license and special plates were revoked, and in granting [him] a limited rehearing at which . . . he was not permitted to examine and cross-examine witnesses and present a defense to the charges on which his dismantler's license and special plates were revoked."

The record does not support the trial court's determination. On December 11, 1989, 17 days after he was informed of his license revocation, Evans wrote a letter to DMV requesting reconsideration of its decision. The sole support for his request was Evans's unsworn statement that he did not receive notice of the hearing. Although DMV had discretion to grant relief from default and reconsider its decision in light of the abbreviated showing made by Evans (*Lindell Co. v. Board of Permit Appeals* (1943) 23 Cal.2d 303, 319), we cannot say DMV abused its discretion in not remanding the matter for a hearing regarding whether Evans received notice.

In analogous situations in civil actions, which provide a helpful comparison (Cal. Administrative Hearing Practice (Cont. Ed. Bar 1984) § 2.41, p. 82), a notice of motion to set aside a default judgment "shall be accompanied by an affidavit showing under oath that the party's lack of actual notice in time to defend the action

was not caused by his or her avoidance of service or inexcusable neglect." (Code Civ. Proc., § 473.5, subd. (b).) Moreover, where service is made by mail in compliance with the manner set forth in a statute, it is the addressee's burden to prove he or she did not receive notice. (*Forslund v. Forslund* (1964) 225 Cal.App.2d 476, 486-487; *Tremayne v. American SMW Corp.* (1954) 125 Cal.App.2d 852, 854.)

Here, Evans merely made a bare, unsworn allegation that he had not received notice of the hearing; he provided no evidence or argument supporting his assertion, nor did he establish that the alleged lack of notice was not due to his avoidance of service or inexcusable neglect. In fact, Evans did not even request a hearing to present evidence on this issue.

Evans contends his bald assertion of no notice was sufficient because, at the time he wrote the letter requesting reconsideration, he was unaware Courtain had received the notice and accusation; he knew only that he had not received them prior to the hearing. However, Evans offers no explanation why, during the time between his receipt of DMV's decision and his written request for reconsideration, he did not investigate the matter and attempt to discover the facts underlying his alleged lack of notice. The onus was on him to provide DMV with an adequate showing that he did not receive notice and that his lack of notice was not due to his avoidance of service or inexcusable neglect. Evans failed to meet his burden.

At oral argument it was suggested that Courtain's signature on the line marked "address" rather than the

line marked "agent" on the return receipt is sufficient to corroborate Evans's bald allegation that he did not receive notice of the accusation and hearing. We are unpersuaded. Because a layperson, such as Courtain, is unlikely to recognize the distinction between the two lines, Courtain's signature on the "address" line is insufficient to alert DMV that Courtain was some person of unknown relation to Evans who did not pass on the notice to him. To the contrary, the most logical and reasonable assumption is that a person signing the receipt for certified mail delivered at Evans's established place of business would give the mail to Evans. As DMV points out, its subsequent decision revoking Evans's license, served by certified mail at his place of business, got to Evans although, like the earlier notice received by Courtain, the receipt was signed by another person on the line marked "address." Hence, the mere fact that the return receipt was signed by Courtain on the "address" line is insufficient to corroborate Evans's bald assertion that he did not receive the notice and accusation served by certified mail at his established place of business. Moreover, Courtain's signature does not tend to establish that Evans's default was not due to his inexcusable neglect or avoidance of service, matters upon which Evans had the burden of proof.

In light of (1) the specific statutory requirement that Evans notify DMV of his business address for the purpose of receiving notices (Gov. Code, § 11505, subd. (c); Veh. Code, § 11513), (2) the requirement that his business be designated clearly so it could be identified properly (Veh. Code, § 11514), (3) the fact DMV had proof that the notice and accusation were delivered by certified mail to

the address provided by Evans for his established place of business, (4) the provision in Government Code section 11505, subdivision (c) that service of the notice and accusation by registered mail to the business address provided by the licensee constitutes effective service, and (5) Evans's failure to provide evidence and argument to support his unsworn claim that he did not receive the notice which was served at his place of business, and his failure to establish that the alleged lack of notice was not due to his avoidance of service or inexcusable neglect, DMV reasonably could conclude that Evans was not entitled to relief from default. Under the circumstances, DMV did not abuse its discretion in granting only a limited rehearing to put in evidence in mitigation consistent with the provisions of the Administrative Procedure Act concerning defaults. (See Gov. Code § 11520.)[9]

The dissent asserts that, by concluding Evans's petition for reconsideration was deficient for failing to provide DMV with something more than Evans's unsworn allegation unsupported by any evidence and argument establishing his entitlement to relief from default due to his alleged failure to receive the notice which was served

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[9] Government Code section 11520 provides in pertinent part:
"(a) If the respondent fails to file a notice of defense or to appear at the hearing, the agency may take action based upon the respondent's express admissions or upon other evidence and affidavits may be used as evidence without any notice to respondent; . . . [¶] (b) *Nothing herein shall be construed to deprive the respondent of the right to make any showing by way of mitigation.*" (Italics added.)

at his place of business, we have required excessive formalism for an administrative proceeding and have imposed an unfair procedural burden on the licensee. We disagree. Although a licensee's request for reconsideration need not be in any particular form, "obviously . . . a request unsupported by grounds *and argument* would not be very convincing to the agency." (Cal. Administrative Hearing Practice, *op. cit. supra*, § 4.58, p. 257, italics added.) This is a matter of common sense. Evans operates a sophisticated business entity in a highly regulated industry and had the burden of establishing that reconsideration was warranted. It should come as no surprise to a reasonable licensee engaged in such a highly regulated business that an unexplained, unsworn allegation of lack of notice will not suffice to meet the licensee's burden. Otherwise, a licensee could defeat the purpose of Government Code section 11505, subdivision (c) — which makes effective the service of notice and accusation by registered mail at the licensee's place of business — simply by asserting baldly that, even though the notice was served at the business address, the licensee never received it. In effect, the dissent would frustrate the purpose of Government Code section 11505 by unreasonably shifting to DMV the burden to negate the licensee's unsworn, unsupported claim of lack of notice, or to establish that the licensee's failure to receive the notice served by registered mail at the place of business was due to the licensee's avoidance of service or inexcusable neglect. As we have noted, Evans had control over who worked and lived at his business premises and had the means to impress upon them the importance of bringing to his attention any notices served by DMV at the business

address. The logical and reasonable assumption is that a person signing the receipt for certified mail delivered at Evans's established place of business would have given the mail to Evans. Thus, Evans's bald assertion that he did not receive the notice was suspect. Under the circumstances, it is not unfair to expect that, as the licensee of a closely regulated business, Evans should have inquired about the service before petitioning for reconsideration and should have supported his claim of lack of notice with some evidence and explanations as to why his alleged failure to receive the notice served at his place of business was not due to Evans's avoidance of service or inexcusable neglect.

Quoting a practice manual, Evans contends that "[w]hen any agency decides to reopen a case under statutory authorization, due process seems to require substantially the same notice and hearing as for the original hearing." (Cal. Administrative Hearing Practice, *op. cit. supra*, § 4.65, p. 264.) Apparently, he believes this means DMV was required to conduct an entirely new evidentiary hearing when it granted his request for reconsideration. He is wrong. When an agency grants reconsideration pursuant to Government Code section 11521, a de novo proceeding is not required. (*Moyer v. State Board of Equalization* (1956) 140 Cal.App.2d 651, 654.) Among other things, Government Code section 11521 provides: "(a) The agency itself may order a reconsideration of all *or part* of the case on its own motion or on petition of any party. . . . " (Italics added.)

In granting Evans's request for reconsideration, DMV remanded the matter "not for a hearing de novo but for the sole purpose of allowing [Evans] to offer evidence in extenuation and mitigation" concerning the appropriate

license discipline. (Gov. Code, § 11520, subd. (b).) In other words, DMV did not grant Evans relief from default entitling him to a new hearing; it merely decided to reconsider the appropriate penalty, not whether Evans committed the various infractions alleged in the accusation. Evans was given notice of the limited new hearing and an opportunity to be heard on the subject to be reconsidered at the hearing. Nothing more was required.

Simply stated, Evans had a vehicle to obtain relief from default, but in his petition to DMV seeking reconsideration he did to establish adequately that he was entitled to such relief. Evans made not showing in the trial court that the facts alleged in his declaration in support of the petition for writ of mandate could not have been submitted to DMV in his petition for reconsideration. Nor did he demonstrate that this evidence was improperly excluded at the rehearing before the administrative law judge. Although it appears Evans was precluded at the rehearing from introducing evidence of his alleged lack of notice of the initial hearing, his tender of such evidence was too late. The scope of the rehearing already had been determined by DMV based upon Evans's inadequate showing in his letter seeking reconsideration, and Evans's letter did not request a hearing on the notice issue or suggest Evans had pertinent evidence to offer on this matter.

Hence, even assuming the facts alleged in Evans's declaration in support of his writ petition established he was entitled to relief from default due to lack of notice, the trial court should not have considered these facts in determining that DMV abused its discretion by failing to

give Evans a hearing on the notice issue. In an administrative mandamus action, judicial review is limited to matters in the administrative record. Additional evidence is admissible only if it was not available at the time of the administrative hearing or was excluded improperly from the record; Evans did not establish that either circumstance was present in this case. (*Schaeffer Land Trust v. San Jose City Council* (1989) 215 Cal.App.3d 612, 624-625, fn. 9; *Toyota of Visalia, Inc. v. New Motor Vehicle Bd.*, (1987) 188 Cal.App.3d 872, 881; Code Civ. Proc., § 1094.5, subd. (e).)[10] Nor could the trial court exercise its independent judgment on the proffered evidence to determine that Evans had not received notice and was entitled to a hearing on the merits prior to the revocation of his license. (Code Civ. Proc., § 1094.5, subd. (e).)

Because the trial court wrongly concluded that DMV's service of the accusation and notice of hearing deprived Evans of his constitutional right to due process of law, and because the trial court erred in ruling that DMV abused its discretion in refusing to provide Evans with a hearing on whether he actually received the accusation and notice of hearing, the judgment must be

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[10] Code of Civil Procedure section 1094.5, subdivision (e) provides: "Where the court finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before respondent, it may enter judgment as provided in subdivision (f) remanding the case to be reconsidered in the light of the evidence; or, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, the court may admit the evidence at the hearing on the writ without remanding the case."

reversed. Consequently, Evans no longer is a prevailing party and the attorney fee order must be reversed. In light of our conclusion, it is unnecessary to address the parties' contentions concerning Evans's entitlement to attorney fees.

DISPOSITION

The trial court's judgment granting Evans's petition for writ of mandate and its subsequent order awarding Evans attorney fees are reversed. The trial court is directed to issue a new order denying Evans's petition and request for attorney fees. Evans shall pay DMV's costs on appeal.

SCOTLAND, J.

PUGLIA, P.J.

I dissent for the reason that the majority impose an unfair procedural burden on Evans to raise the issue that he failed to receive actual notice of the hearing at which his license was revoked.

The majority indulge the assumption, with which I agree, that, notwithstanding that the notice by certified mail satisfied the requirements of Government Code section 11505, subdivision (b), in an appropriate case reconsideration may be granted where the respondent fails to receive it.

Government Code section 11521[1] confers discretion on an administrative agency to order reconsideration "on petition of any party." Neither the section nor any other provision of law prescribes the manner or form of such a petition. Nonetheless, the majority opinion concludes that the *form* of Evans's petition was insufficient to raise the claim that reconsideration should be granted because of lack of actual notice of the disciplinary proceedings against him. "Evans merely made a bare, unsworn allegation that he had not received notice of the hearing; he provided no evidence or argument supporting his assertion, nor did he establish that the alleged lack of notice

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[1] Section 11521 is as follows:

"(a) The agency itself may order a reconsideration of all or part of the case on its own motion or on petition of any party. The power to order a reconsideration shall expire 30 days after the delivery or mailing of a decision to respondent, or on the date set by the agency itself as the effective date of the decision if that date occurs prior to the expiration of the 30-day period or at the termination of a stay of not to exceed 30 days which the agency may grant for the purpose of filing an application for reconsideration. If additional time is needed to evaluate a petition for reconsideration filed prior to the expiration of any of the applicable periods, an agency may grant a stay of that expiration for no more than 10 days, solely for the purpose of considering the petition. If no action is taken on a petition within the time allowed for ordering reconsideration, the petition shall be deemed denied.

"(b) The case may be reconsidered by the agency itself on all the pertinent parts of the record and such additional evidence and argument as may be permitted, or may be assigned to an administrative law judge. A reconsideration assigned to an administrative law judge shall be subject to the procedure provided in Section 11517. If oral evidence is introduced before the agency itself, no agency member may vote unless he or she heard the evidence."

was not due to his avoidance of service or inexcusable neglect." (Maj. opn. at p. 19.)

In my view the majority unfairly rely upon hindsight, the sort of decision which Jeremy Bentham condemned as "dog law," after the manner in which some people trained their dogs by kicking them without warning to indicate displeasure. The majority point to Code of Civil procedure section 473.5 as the guide for the procedure that Evans should have followed. That provision, addressed to judicial proceedings, supplies a rule, which the Legislature might well be wise to enact or DMV to promulgate for application to administrative proceedings. They have not. Evans should not be faulted for failing to anticipate that he would be required to satisfy the requirements of a *judicial* procedure in an *administrative* petition for rehearing in order to perfect his claim of failure to receive actual notice.

Administrative proceedings have never been held subject to the rigorous formality of judicial proceedings. "An application for rehearing before an administrative tribunal . . . is not to be construed with the same strictness required for instance in a motion for a new trial before a court of law." (*Lindell Co. v. Board of Permit Appeals* (1943) 23 Cal.2d 303, 320.) In light of this policy the majority's borrowed formalism is unforeseeable. It is also inconsistent with the statutory policy that to put in issue a defense in an administrative proceeding a respondent need only file a written notice of defense, which "need not be verified or follow any particular form." (Gov. Code, § 11506, subd. (c).)

Administrative agencies exercise enormous power over the citizenry, which, as with Evans, often lack the benefit of legal counsel until too late in the game to do any good. I cannot countenance cutting off a potentially meritorious claim of lack of actual notice of the administrative proceeding on the ground that unrepresented citizens failed to comply with unannounced procedural requirements identified only when the case has reached the appellate courts. In my view of Evans's layman's letter was adequate to raise his claim that he should be granted full reconsideration and a hearing on the merits of the accusation.

Faced with Evans's claim DMV should either have granted full reconsideration, asked him to make a more formal showing, or granted provisional reconsideration to decide the merits of the claim of excusable lack of actual notice. The lattermost action could be sensibly accomplished by affording him a hearing on the merits of the accusation only if his claim of failure of actual notice was first shown to be meritorious. In failing to proceed in this manner DMV abused the discretion afforded it under Government Code section 11521 by effectively failing to entertain the potentially valid claim of excusable lack of notice.

Faced with these circumstances, the trial court did not err in considering the evidence which Evans proffered in support of his claim of excusable lack of actual notice. Code of Civil Procedure section 1094.5, subdivision (e) provides that the administrative record may be augmented "[w]here the court finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly

excluded at the hearing before respondent. . . . " The Legislative policy which animates this provision applies to this case.

A court is not bound to suffer injustice for lack of an express statutory invitation to apply a salutary statutory policy. In the absence of an express statutory direction a court may exercise its common law powers to fill out the statutory scheme to avoid injustice. (See Traynor, Statutes Revolving in Common-Law Orbits (1968) 43 State Bar J. 509.) Having correctly decided that Evans was diligent in advancing his relevant evidence concerning excusable lack of notice, the trial court could consider that evidence and resolve the merits of the question. (See Code Civ. Proc., § 1094.5, subd. (e).)

Since the resolution by the trial court presents no abuse of discretion, I would uphold the judgment insofar as it directs DMV to afford Evans a hearing on the merits of the accusation against him. (CERTIFIED FOR PUBLICATION.)

BLEASE, J.

APPENDIX C

COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento County)

JAMES M. EVANS Plaintiff and Respondent, v. DEPARTMENT OF MOTOR VEHICLES, et al., etc. Defendants and Appellants.	3 Civil No. C011373 (Super.Ct.No. CV364057)

By the Court:

Respondent's petition for rehearing is denied.

Dated: February 10, 1994

PUGLIA, P.J.

APPENDIX D

Third Appellate District No. C011373
S038115

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

JAMES M. EVANS	:	SUPREME
Respondent,	:	COURT
	:	FILED
v.	:	Mar 31 1994
DEPARTMENT OF MOTOR VEHICLES, et al.,	:	
Appellants.	:	

Respondent's petition for review DENIED.

Mosk, J. is of the opinion the petition should be granted.

Lucas
Chief Justice